

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1917
74-1946

B
P/S

To be argued by
IRVING ANOLIK and
HERALD PRICE FAHRINGER

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ANTHONY POLITI, GERALD POLITI, PHILIP POLITI,
MICHAEL ROMAN, ROBERT PETERS, MICHAEL
CAMPOREALE, ALPHONSE CUZZO, ARTHUR
FRANGELLO, LEONARD HARRISON, LAWRENCE
JOHNSON, LOUIS VISCONTI, EDDIE WASHINGTON, and
HARRY WEIS,

Appellants.

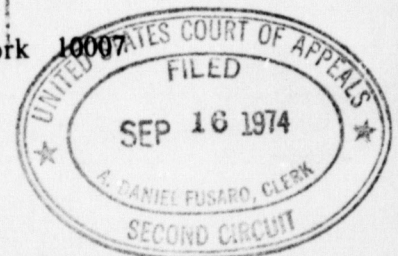
*On Appeal from the United States District Court for the
Southern District of New York.*

APPELLANTS' BRIEF

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202
(716) 856-8400

IRVING ANOLIK
225 Broadway
New York, New York 10007
(212) 732-3050

Attorneys for Appellants



(7580)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J.
(201) 257-6850

New York, N. Y.
(212) 565-6377

Philadelphia, Pa.
(215) 563-5587

Washington, D. C.
(202) 783-7288

TABLE OF CONTENTS

Brief

| | Page |
|--|------|
| Questions Presented | 1 |
| Constitutional Provisions: | |
| Amendment IV | 2 |
| Amendment V | 3 |
| Statutes Involved | 3 |
| Statement of Facts | 7 |
| The Indictment | 8 |
| The Trial | 9 |
| Argument: | |
| Point I. The indictment is jurisdictionally defective because it charges the mere possession of policy slips, a crime which does not come within the scope or intent of §1955 | 19 |
| Point II. The appellants, Anthony Politi and Harry Weis, raised the defense of double jeopardy and collateral estoppel as a bar to prosecution under the instant indictment since it embraces part of the time period of a prior similar indictment in which they were both acquitted (71 Cr. 857), and some of the evidence presented herein is | |

Contents

| | Page |
|--|------|
| identical to the evidence adduced at the former indictment. The Court should have granted the motion to dismiss the present charges as being violative of the constitutional prohibition against placing an accused twice in jeopardy under substantially similar circumstances. | 28 |
| Point III. The appellants cannot be convicted of conspiracy since concerted action of more than five persons is an indispensable element of the crime of syndicated gambling under §1955 of Title 18. | 45 |
| Point IV. Statement of Anthony Politi antedating the conspiracy charged in the indictment by two years should have been excluded. | 50 |
| Point V. The government failed to prove that five or more persons combined to promote gambling in violation of Section 225.05 of the New York Penal Law. | 54 |
| Failure to Prove the Promotion of Policy | 55 |
| Point VI. Appellant's Fourth Amendment rights were violated because: | |
| (A) The warrant for 77 Broadway, Park Ridge, New Jersey, failed to adequately describe the premises; | |

Contents

| | Page |
|---|------|
| (B) All the warrants and the arrest of appellant Roman were invalid because they were based on: | |
| 1) Double hearsay; | |
| 2) Unreliable informants; | |
| 3) "Stale" information; and | |
| 4) The affiant's unsubstantiated conclusion that §1955 was being violated. | 66 |
| Particularity of Description | 67 |
| Double Hearsay | 72 |
| Reliability of Informants | 76 |
| Stale Probable Cause | 81 |
| Probable Cause | 85 |
| Conclusion | 90 |

TABLE OF CITATIONS

Cases Cited:

| | |
|---|----------------|
| Abbate v. United States, 1959, 359 U.S. 187, 196, 201, 79 S.Ct. 666, 3 L.Ed. 2d 729 | 33, 35, 37 |
| Aquilar v. Texas, 378 U.S. 108 (1964) | 76, 77, 79, 89 |

Contents

| | Page |
|---|------------------------|
| Ashe v. Swenson, 397 U.S. 436 (1970) | 31, 35, 37, 40, 43, 44 |
| Baker v. United States, 393 F.2d 604 (9th Cir. 1968) | 47 |
| Barfkus v. Illinois, 359 U.S. 121 | 40, 42 |
| Becker v. United States, ___U.S.__ (May 28, 1974) | 48 |
| Benton v. Maryland, 395 U.S. 784 (1969) .. | 40 |
| Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932) . | 34, 44 |
| Bruton v. United States, 390 U.S. 123 | 43 |
| Carter v. McClaughry, 183, U.S. 365, 395, 22 S.Ct. 181, 46 L.Ed. 236 (1902) | 34 |
| Clawans v. Rives, 104 F.2d 240 (D.C.Cir. 1939) 122 A.L.R. 1436 | 32 |
| Conti v. Morgenthau, 232 F. Supp. 1004 (S.D.N.Y. 1964) | 85 |
| Coyne v. Watson, 282 F. Supp. 235, 237-38 (S.D. Ohio 1967) | 85 |
| Downum v. United States, 372 U.S. 734, 10 L.Ed. 2d 100, at 102, 103 | 32 |

Contents

| | Page |
|---|--------|
| Duncan v. Tennessee, 405 U.S. 127, 130, 92 S. Ct. 785, 31 L.Ed. 2d 86 (1972) . . . | 37 |
| Durham v. United States, 403 F.2d 190 (9th Cir. 1968) | 84 |
| Ebeling v. Morgan, 237 U.S. 625, 630-31, 35 S. Ct. 710, 59 L.Ed. 1151 (1915) | 34 |
| Ex parte Bain, 121 U.S. 1 (1886) | 22 |
| Ex parte Nielson, 131 U.S. 176, 187-88, 9 S. Ct. 672, 33 L.Ed. 118 (1889) | 34, 44 |
| Gavieres v. United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L.Ed. 489 (1911) . . | 34, 39 |
| Gebardi v. United States, 287 U.S. 112 (1932) . | 46 |
| Girodenello v. United States, 357 U.S. 480, 486 (1958) | 87 |
| Gould v. United States, 355 U.S. 298, 304 (1921) | 72 |
| Green v. United States, 355 U.S. 184 . . . | 31, 32 |
| Grubb v. Oklahoma, 409 U.S. 1017-19, 93 S.Ct. 450, 30 L.Ed. 2d 309 (1972) | 37 |
| Harris v. Washington, 404 U.S. 55, 57, 92 S. Ct. 183, 30 L.Ed. 2d 212, (1971) | 31, 37 |

Contents

| | Page |
|---|------------|
| Houston v. Moore, 5 Wheat. 1 (1820) | 42 |
| Iannelli v. United States, 42 U.S.L.W. 365, 15 Cr.L. 4063 | 49 |
| Jones v. United States, 357 U.S. 493 (1958) . | 74 |
| Ledbetter v. United States, 170 U.S. 606 (1898) | 22 |
| Maraker v. United States, 370 U.S. 711, 82 S.Ct. 1573, 8 L.Ed. 2d 803 (1962) | 36 |
| Miller v. Oregon, 405 U.S. 1047, 92 S.Ct. 1321, 31 L.Ed. 2d 590 (1972) | 37 |
| Morey v. Commonwealth, 108 Mass. 433, 434 (1871) | 34, 36, 38 |
| Murphy v. Waterfront Commission, 378 U.S. 52 (1964) | 40, 41 |
| People v. Abelson, 309 N.Y. 643 (1966) . | 55, 62, 64 |
| People v. Cox, 107 Mich. 435, 65 N.W. 283 . | 32 |
| People v. Dickerson, 54 Misc. 2d 436 (1967) . | 55 |
| People v. Feidler, 31 N.Y. 2d 176, 335 N.Y.S. 2d 377 (1972) | 23 |

Contents

| | Page |
|--|------------|
| People v. Gerardi, 5 A.D. 2d 993, 173 N.Y.S. 2d 302 (1958) | 61 |
| People v. Gogarty, 5 A.D. 2d 413, 172 N.Y.S. 2d 734 (1st Dept. 1958) | 61 |
| People v. Leavitt, 301 N.Y. 113 (1950) . | 59, 60, 61 |
| People v. Mitchell, 237 N.Y.S. 2d 775 (1963) . . | 60 |
| People v. Politi, 19 N.Y. 2d 623, 278 N.Y.S. 2d 407 (1967) | 55, 56 |
| People v. Russell, 34 N.Y. 2d 261 (1974) . . . | 60 |
| People v. West, 237 N.Y.S. 2d 978 (1963) . . . | 60 |
| People v. Wolosky, 296 N.Y. 236 (1947) . | 59, 60, 61 |
| Petite v. United States, 361 U.S. 529, 80 S. Ct. 450, 4 L.Ed. 2d 490 (1960) | 36 |
| Re Snow, 120 U.S. 274 (1887) | 32 |
| Reno v. United States, 317 F.2d 499 (5th Cir. 1963) | 47 |
| Robinson v. Neil, 409 U.S. 505, 511, 93 S. Ct. 876, 35 L.Ed. 2d 29 (1973) . . . | 36, 37 |
| Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966) | 85 |

Contents

| | Page |
|--|------------|
| Russell v. United States, 369 U.S. 749 (1962) . | 22 |
| Schoeneman v. United States, 317 F.2d 172 (D.C. Cir. 1963) | 85 |
| Sgro v. United States, 287 U.S. 206, 210-11 (1932) | 81, 83, 84 |
| Simpson v. Florida, 403 U.S. 384, 387, 91 S. Ct. 1801, 29 L.Ed. 2d 549 (1971) | 37 |
| Spinelli v. United States, 393 U.S. 410 (1969) | 77, 78, 79 |
| United States v. Alver Purks, et al., Docket No. 238-72 (W.D.N.Y. 1974) | 24 |
| United States v. Anthony, 145 F. Supp. 323 (M.D. Pa. 1956) | 47 |
| United States v. Barzie, 433 F.2d 984 (2nd Cir. 1970) cert. denied, 401 U.S. 975 | 39 |
| United States v. Becker, 461 F.2d 230 (2nd Cir. 1972) | 24, 48, 55 |
| United States v. Birnbaum, 337 F.2d 490 (2nd Cir. 1964) | 51, 52, 53 |
| United States v. Bozza, 365 F.2d 206, 213 (2nd Cir. 1966) | 51 |

Contents

| | Page |
|---|------------------------|
| United States v. Central Veal and Beef Company, 162 F.2d 766 (2d Cir. 1947) . . | 45, 47 |
| United States v. Cioffi, 487 F.2d 492 (2d Cir. 1973) | 26, 27, 36, 37, 38, 40 |
| United States v. Cogan, 266 F. Supp. 371 (S.D.N.Y. 1969) | 47 |
| United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968) | 47 |
| United States v. Cruikshank, 92 U.S. 542 (1876) | 22 |
| United States v. Cuadrado, 413 F.2d 633 (2d Cir. 1967) | 53 |
| United States v. De Angelo, 138 F.2d 466 (3rd Cir. 1943) | 34 |
| United States v. Esters, 336 F. Supp. 214, 219-21 (E.D. Mich. 1972) | 72 |
| United States v. Ewell, 383 U.S. 116, 124- 25, 86 S. Ct. 773, 15 L.Ed. 2d 627 (1966) . . . | 35 |
| United States v. Falcone, 109 F.2d 579 (2d Cir. 1940), aff'd., 311 U.S. 205 . . | 68, 69 |
| United States v. Fitzmaurice, 45 F.2d 133, 135 (2d Cir. 1930) | 68, 84 |

Contents

| | Page |
|--|--------------------|
| United States v. Glasser, 433 F.2d 994 (2d Cir. 1971) | 53 |
| United States v. Hagan, 27 F. Supp. 814 (W.D. Ky. 1939) | 46 |
| United States v. Harris, 403 U.S. 573 (1971) | 79, 80 |
| United States v. Hotle, 236 U.S. 140 (1915) . | 47 |
| United States v. Jorn, 400 U.S. 479 | 44 |
| United States v. Katz, 271 U.S. 354 (1926) . . | 47 |
| United States v. Keilly, 445 F.2d 1285 (2d Cir. 1971) | 53 |
| United States v. Kramer, 289 F.2d 909 (2d Cir. 1961) | 33, 38, 39, 40 |
| United States v. Lamont, 236 F.2d 312 (2d Cir. 1956) | 22 |
| United States v. Manetti, 309 F. Supp. 174 (D. Del. 1970) | 77 |
| United States v. McCall, 489 F.2d 359, 362 (2d Cir. 1973) | 39 |
| United States v. Michael Leo Fiorella, et al., (Docket No. 1971-45, W.D.N.Y. 1971) aff'd., 468 F. 2d 688 (2d Cir. 1972) | 24, 55, 64, 65, 75 |

Contents

| | Page |
|---|------------|
| United States v. New York Central and H.R.R. Company, 146 F.298 (Cir. Ct., S.D.N.Y. 1906) | 46 |
| United States v. Pearce, 275 F.2d 318 (7th Cir. 1960) | 73 |
| United States v. Phillips, 401 F.2d 301 (7th Cir. 1968) | 34 |
| United States v. Pisano, 191 F. Supp. 861 (S.D.N.Y. 1961) | 69 |
| United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960) | 74 |
| United States v. Robinson, 325 F.2d 391 (2d Cir. 1963) | 75, 76 |
| United States v. Sabella, 272 F.2d 206, 211 (2d Cir. 1959) | 37, 38, 40 |
| United States v. Sager, 49 F.2d 725 (2d Cir. 1931) | 45, 46 |
| United States v. Santore, 290 F.2d 51 (2d Cir. 1960) | 69, 70, 72 |
| United States v. Simmons, 96 U.S. 360 (1878) | 22 |

Contents

| | Page |
|---|--------|
| United States v. Simon, 225 F.2d 260 (3rd Cir. 1955) | 34 |
| United States v. Spinelli, 393 U.S. 410 (1969) | 75 |
| United States v. Ventresca, 380 U.S. 402 (1965) | 74 |
| United States v. Vivero, 418 F.2d 971 (2d Cir. 1969) | 53 |
| United States v. Williams, 341 U.S. 70 (1951) | 38 |
| United States v. Williams, 459 F.2d 909, 912 (6th Cir. 1972) | 88 |
| United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943) | 45, 46 |
| Waller v. Florida, 397 U.S. 387, 390, 90 S.Ct. 1184, 25 L.Ed. 2d 435 (1970) | 35 |
| Yates v. United States, 354 U.S. 298 (1957) | 38 |
| Yawn v. United States, 244 F.2d 235 (5th Cir. 1957) | 34 |

Contents

Page

Statutes Cited:

18 U.S.C., Title 18,

| | |
|--|----------------------|
| §1084 | 86 |
| §1952 | 86, 87 |
| §1955 | 1, 2, 3, 7, 8, 9, 18 |
| 19, 20, 21, 24, 25, 26, 27, 28, 45, 49, 58, 66, 87 | |

Internal Revenue Code of 1954, par. (3)

| | |
|-------------------------------|---|
| subsection (c) §501 | 6 |
|-------------------------------|---|

New York Penal Law,

| | |
|-------------------|-----------------------------|
| §225 | 62, 63 |
| §225.05 | 2, 8, 9, 19, 24, 25, 54, 57 |
| §225.10 | 24 |
| §225.15 | 8, 9, 19, 25, 58, 61 |
| §225.35 | 64 |
| §974 | 57, 59, 60 |

United States Constitution Cited:

| | |
|----------------------------|-------------------|
| Fourth Amendment | 2, 66 |
| Fifth Amendment | 3, 30, 33, 40, 41 |

Other Authorities Cited:

American Bar Association Standards, The
Prosecution Function and the Defense
Function, Sec. 6.1 (Approved Draft,
1971)

43

Contents

| | Page |
|---|------|
| 3 Holdsworth, History of English Law, 614 . | 33 |
| Note, Twice in Jeopardy, 75 Yale L.J. | |
| 264 (1965) | 35 |

In the
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x

UNITED STATES OF AMERICA,

Appellee,

vs.

ANTHONY POLITI, GERALD POLITI,
PHILIP POLITI, MICHAEL ROMAN,
ROBERT PETERS, MICHAEL CAMPOREALE,
ALPHONSE CUZZO, ARTHUR FRANGELLO,
LEONARD HARRISON, LAWRENCE JOHNSON,
LOUIS VISCONTI, EDDIE WASHINGTON,
and HARRY WEIS,

Appellants.

-----x

APPELLANTS' BRIEF

QUESTIONS PRESENTED

1. Whether the indictment is jurisdictionally defective because it charges the mere possession of policy slips, a crime which does not come within the scope or intent of §1955?
2. Whether appellants can be convicted of conspiracy since concerted action of more than five persons is an indispensable element of the crime of syndicated

gambling under §1955 of Title 18?

3. Whether statements of an appellant antedating the conspiracy charged in the indictment by two years should have been excluded?

4. Whether the government failed to prove five or more persons combined to promote gambling in violation of §225.05 of the New York Penal Law?

5. Whether appellants' fourth amendment rights were violated by warrants which failed to adequately describe the premises to be searched and were based upon double hearsay, unreliable informants and stale information?

6. Whether Anthony Politi and Harry Weis were subjected to Double Jeopardy by virtue of the fact that they were acquitted on a prior trial involving the identical parties; the same statutes and many similar facts?

Constitutional Provisions

AMENDMENT [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

United States Code, Title 18

§1955. Prohibition of illegal gambling businesses.

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling

business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section--

(1) "illegal gambling business" means a gambling business which--

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of \$2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizure, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeiture; and the compromise of claims and the award of compensation

to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended, if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

STATEMENT OF FACTS

Appellants were tried and convicted of violating §1955 of Title 18 of the United States Code, making it a federal offense for five or more persons to conduct an illegal gambling business and conspiracy before the Hon. Morris E. Lasker, sitting without a jury, in the United States District Court for the Southern District of New York.* The appellants were tried on June 11 and 12, 1973, and the court rendered a written decision on the 23rd day of October, 1973. Anthony Politi, Gerald Politi, Philip Politi, Michael Roman, Robert Peters, Michael Camporeale, Alphonse Cuzzo, Arthur Frangello, Louis Visconti and Harry Weis appeal their convictions. On the 14 day of June , 1974 Judge Lasker imposed the following sentences:

| | |
|----------------|---|
| Anthony Politi | one year three years probation, \$7500 fine |
| Gerald Politi | four months |
| Philip Politi | two months |
| Michael Roman | one year (to run con- currently with sentence already being served for another offense)* |

* The defendants were convicted under a two-count indictment. A third count of the indictment charging Michael Camporeale with perjury was severed.

| | |
|------------------|-------------|
| Robert Peters | six months |
| Alphonse Cuzzo | six months |
| Arthur Frangello | four months |
| Louis Visconti | one month |
| Harry Weis | two months* |
| Lawrence Johnson | four months |

THE INDICTMENT

The indictment charged that from September 1, 1970 until the filing of the indictment (January , 1973) the appellants unlawfully conducted, financed, managed, supervised, directed or owned a policy gambling business in violation of §225.05 and §225.15 of the New York Penal Law, all in violation of §1955 of Title 18 of the United States Code (count 2), and conspiring to violate §1955 (count 1).

* Harry Weis was sentenced on June 28, 1974.

THE TRIAL

As the Court knows, the defendants-appellants were jointly charged with violating Title 18 United States Code Section 1955, by unlawfully, willfully, and knowingly conducting, financing, managing, supervising, directing, and owning a policy gambling business in violation of Sections 225.05 and 225.15 of the Penal Law of the State of New York, involving five or more persons who conduct, finance, manage, supervise, direct, and own a part of said gambling business which remain in substantially continuous operation for a period in excess of thirty days and had a gross revenue of substantially in excess of \$2,000.00 in a single day, and of conspiring to do so.

The case was tried sans a jury and we therefore submit the evidence as stipulated to by the respective parties. With the exception of suppression hearing and expert testimony, there was no live testimony other than stipulations. The evidence was extremely thin and particularly with reference to such personalities as ANTHONY POLITI, we submit that it was virtually non-existent.

On August 29, 1972, the F.B.I. made numerous gambling arrests. ANTHONY POLITI was arrested that day while seated in an automobile with defendant MICHAEL ROMAN, which automobile was parked near the Sawmill River Parkway in Yonkers.

The testimony of ROBERT PETERS revealed that he was arrested as he was returning to that automobile after having

used a public telephone booth.

It is not disputed, and, as a matter of fact is conceded by the Government, that defendant-appellant ANTHONY POLITI was not committing any crime in the presence of the arresting officers. As appears infra, ANTHONY POLITI's apprehension by the authorities on August 29, 1972 was apparently totally groundless and without legal justification of any sort. As a matter of fact, it appears that the authorities had no idea that they would apprehend ANTHONY POLITI and the evidence, we submit, demonstrates that he was included in this crime as an afterthought. Prior to August 29, 1972, all of the appellants in this indictment, save defendant ROBERT PETERS, had been under surveillance and were either named or identified in various affidavits in support of search warrants and arrest warrants which were employed to make the mass arrests on the aforesaid date.

It is striking that ANTHONY POLITI's name is not mentioned in any of these affidavits directly or indirectly. Furthermore there is no indication that he

was ever observed during the course of these various surveillances in any incriminating sense.

It is remarkable that the complaint and supporting affidavit against appellants ANTHONY POLITI and ROBERT PETERS was first drafted and executed on August 30, 1972, the day following their arrests. The original complaints indicated that the conspiracy involved herein commenced in January of 1972 but, when the indictment was finally handed up, it described the conspiracy as having begun in September, 1970. The Government's indictment was expanded apparently to tailor it to include ANTHONY POLITI, thus revealing that his inclusion in the alleged criminal violations was contrived as an afterthought.

The two complaints surrounding the arrest of appellant ANTHONY POLITI do not refer to the arrest of ANTHONY POLITI by state and local police in Rockland County, New York, (Bobin Cabins and Motel) in January of 1971 because the investigation which led to his inadvertent arrest commenced in January of 1972.

As appears in the stipulations and in the testimony at the suppression hearing, there was a serious question

raised as to whether or not the search warrant utilized in the Rockland County arrest of ANTHONY POLITI in January 1971 had been altered, as alleged by the defendants.

The Court explored this question at length and, in fact, heard expert testimony called by the defense and by the Government.

The Government relied upon the testimony of Acrel Simon, who allegedly met ANTHONY POLITI in Newburg, New York, in late 1968, which was long before the alleged commencement of the instant conspiracy (GX 32).*

Supposedly, ANTHONY POLITI had explained to Simon that he was seeking his help in enlisting runners for the gambling operation in the Newburgh, New York area, and explained percentages that POLITI was currently paying to such persons.

Simon allegedly spoke to twelve or fifteen black people, including EDDIE WASHINGTON. Later these people attended a meeting chaired by ANTHONY POLITI at the Holiday Inn, Newburgh, New York, where he supposedly

* "GX" refers to Government Exhibit.

repeated the proposition he had given to Acrel Simon. According to the testimony which the Government proffered through stipulations, POLITI discussed the gambling enterprise with EDDIE WASHINGTON and Allan Handler, the latter being appointed the "boss" of the Newburgh area by POLITI.

The Government submitted that Allan Handler appointed LAWRENCE JOHNSON comptroller of the Poughkeepsie area. Simon worked from about June 1969 until June 1970 and allegedly picked up a package from EDDIE WASHINGTON which he brought to Allan Handler. Simon was receiving \$300.00 weekly for his labors. From August 1970 until June 1971, at the directions of Handler, Simon stated that he received packages from LOUIS VISCONTI, AUGIE SMREK and EDDIE WASHINGTON.

Acrel Simon separated the money from the policy work, giving the cash to Handler and the policy work to PHILIP POLITI. (See GX 32).

The Government further demonstrated, over objection, that on August 26th and 28th, 1970, ANTHONY POLITI met with Raymond Shaw, a State Police Investigator, and discussed protection payments for his policy operation in

Rockland County. POLITI allegedly agreed to supply information to Shaw regarding rival policy operations in the Rockland area to make Shaw look good. On October 28, 1970, ANTHONY POLITI allegedly gave Raymond Shaw \$1,000.00 (GX 2B, 37, and 2A).

Raymond Shaw, accompanied by Robert Parkhurst, another officer, arrested ANTHONY POLITI in a policy bank at the Bobbin Inn Motel, Rockland Lake, New York, also conducting a search on January 26, 1971. During this arrest, the officers seized policy plays, records, adding machines, and other paraphernalia (GX 1A-1E). Also arrested at this time were MICHAEL ROMAN and PHILIP POLITI (GX 34, 35 and 40).*

In June or July of 1971, Acrel Simon, Allan Handler, ANTHONY POLITI, and PHILIP POLITI met in Tarrytown, Westchester County, New York, where Handler accused Simon of having added numbers to the policy work. Simon was not permitted to work anymore. Around August of 1971,

* This Court should bear in mind that ANTHONY POLITI and HARRY WEIS had been acquitted of another similar charge in the Federal Court, Southern District, under Indictment 71 Cr. 857. The termination date of the conspiracy in 71 Cr. 857 was May 24, 1971, and encompassed the Bobbin Inn incident.

Acrel Simon went to ARTHUR FRANGELLO and asked to speak to ANTHONY POLITI. A week later FRANGELLO told Simon to see Allan Handler and, shortly thereafter, Handler, ANTHONY POLIT, and Simon met for breakfast, at which time Simon asked when he could go back to work. POLITI stated he would be in touch (GX 32).

Patricia Hyatt was hired by ROBERT PETERS and worked for the policy enterprise from about June 1971 until June 1972, intermittently. She picked up work from FRANGELLO, WASHINGTON, and LEONARD HARRISON, which she delivered to PHILIP POLIT, GERALD POLITI and HARRY WEIS.

When she first learned her route, PHILIP POLITI took her to the Grand Union parking lot in Cornwall, New York, introducing her to ARTHUR FRANGELLO. At this time FRANGELLO handed her a package of policy work and then EDDIE WASHINGTON and Allan Handler drove up, to whom she was also introduced (GX 3B-ARTHUR FRANGELLO: GX 3A-HARRY WEIS; and GX 3C-LEONARD HARRISON).

The Government produced observations of Federal Bureau of Investigation agents, GX 42, revealing, among other things, that on March 21, 1972, ANTHONY POLITI met ROBERT PETERS, Allan Handler and ARTHUR FRANGELLO in

Vails Gate, New York, at about 5:00 P.M. for 15 minutes.

On April 27, 1972, MICHAEL CAMPOREALE met HARRY WEIS in Fishkill, New York.

The agents stated that Camporeale drove to Yonkers where he placed a package in a bush--covered it with debris at the rear of the Great Eastern store at 6:13 P.M. The agents retrieved this package and found it to contain policy bets and returned it to the original spot. The package was picked up by GERALD POLITI at 6:37, who drove to PHILIP POLITI's house.

At about 9:15 P.M. PHILIP POLITI, ANTHONY POLITI, and ROBERT PETERS met in a parking lot in Greenburgh, New York. Thereafter PHILIP POLITI crossed the street and met HARRY WEIS.

On May 22, 1972, LOUIS VISCONTI placed a package in MICHAEL ROMAN's car in Highland Falls, New York, and about two hours later MICHAEL ROMAN and ANTHONY POLITI talked in a parking lot near ROMAN's car. Later ROMAN met LOUIS VISCONTI in New Windsor for about an hour and twenty minutes.

On August 28th and 29th, 1972, GERALD POLITI entered

a telephone booth adjacent to one which ALPHONSE CUZZO had entered previously and left an envelope. On August 29th, 1972, CUZZO entered another nearby telephone booth and left envelopes.

On August 29th, 1972, after GERALD POLITI left an envelope at 8:55 P.M., ROBERT PETERS, ANTHONY POLITI and MICHAEL ROMAN arrived together at 9:31 P.M. and ROBERT PETERS retrieved the envelope. The envelope contained policy ribbons.

ANTHONY POLITI was arrested at this time and was carrying \$1,021.00 in cash. ROMAN, who was also arrested, carried policy gambling records (GX 42, pp.6-7).

The remaining facts can be gleaned from the various stipulations and from the points of law which will refer to certain facts in the brief herein.

The Government's position was that the evidence revealed that the gambling enterprise was in substantially continuous operation since September 1970 and that on at least three occasions, May 22, 1972, June 1, 1972, and August 29, 1972, that they established that over \$2,000.00 worth of business was transacted.

As the brief, *infra*, will reveal, the defendants-appellants vehemently deny that the Government established a violation of 18 U.S.C. 1955 or of a conspiracy to do so and, moreover, that so far as ANTHONY POLITI and HARRY WEIS are concerned, this was the same conspiracy of which they were acquitted in the prior indictment herein, 71 Cr. 857.

POINT I

THE INDICTMENT IS JURISDICTIONALLY DEFECTIVE BECAUSE IT CHARGES THE MERE POSSESSION OF POLICY SLIPS, A CRIME WHICH DOES NOT COME WITHIN THE SCOPE OR INTENT OF §1955.

The indictment charges, under both the substantive and conspiracy counts, that the appellants combined "to conduct . . . an illegal gambling business, to wit: a policy business . . . in violation of the laws of the State of New York, Penal Law §§225.05 and 225.15." (Emphasis supplied.) Thus, the indictment charged the appellants with promoting policy (§225.05) and possession of policy slips (§225.15).^{*} Accordingly, the government erroneously charged both crimes, i.e., promoting policy and possession

* Section 225.15 provides in pertinent part:

"A person is guilty of possession of gambling records in the second degree when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article;

* * *

"(2) of a kind commonly used in the operation, promotion or playing of a lottery or policy scheme or enterprise;"

of policy slips, as a violation of §1955. This turned out to be the government's worst miscalculation, for by including this low visibility possessory offense within its charges, it fatally disabled the indictment.

Section 1955 is uninhabited by any words which suggest in the slightest degree that Congress intended that the mere possession of policy slips comes within the clutches of this new gambling statute. The section deals exclusively with gambling action.* Certainly Congress never meant that the already over-extended resources of the federal government be misspent in the prosecution of persons who merely possess more than ten policy clips. Such a misconstruction would fling open the sluice gates and flood our federal courts with literally hundreds of

* Section 1955 of Title 18 provides in pertinent part:

"(a) Whoever conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business

* * *

"(2) 'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling changes therein." (Emphasis supplied.)

thousands of small policy writers who were previously prosecuted by the states.*

* Significantly, in 1970, 8,366 persons were arrested for the offense of misdemeanor gambling in New York State alone. Director of Records and Statistics, New York State Department of Correctional Services.

Significantly, the Association of the Bar of the City of New York, displaying great foresight, opposed the enactment of §1955 on these very grounds by stating:

"Similarly, proposed Section 1955, which makes gambling illegal under the laws of any state or political subdivision thereof a federal crime, goes far beyond the targets of the Bill, which are said to be the 'large-scale business enterprise of gambling,' Senate Report 71, and 'illicit gambling business of major proportions,' Senate Report 73. In our view, no need has been demonstrated for so dramatic a departure from its traditional federal principles, which shun unnecessary interference with the local administration of justice. It is one thing for the federal government to intervene to end local corruption, the objective of proposed Section 1511, since local corruption so badly hinders local law enforcement activities; but is quite another thing to enforce a state's substantive criminal law, as Section 1955 would do. If the anti-corruption Section were adopted in an improved form and achieved its purpose, local law enforcement should become more vital and there would be little need for the federal government to intervene.

* * *

"However, the consequences are more serious under this Section, since a five-year jail sentence and a \$20,000 fine can be imposed on anyone who 'participates in an illegal gambling business.' As noted above, this penalty could be asserted against small-time bookmakers and could possibly apply to their customers as well." (The Association of the Bar of the City of New York Committee on Federal Legislation's Report on the Proposed Organized Crime Control Act of 1969 (S.30), May 12, 1970, pp. 37-38.)

The prosecution, apparently recognizing the merits to the defendants' argument in the trial court, urged that they should have the option of proving these defenses in the disjunctive. However, under an unbroken series of cases extended over a long stretch of the Supreme Court's history, that option is now foreclosed by the precise language of the indictment. Since the grand jury voted this indictment, the government was without authority to alter its language.

An indictment returned by a grand jury must allege the specific offenses against which the defendant is obliged to defend. Russell v. United States, 369 U.S. 749 (1962); Ledbetter v. United States, 170 U.S. 606 (1898); Ex parte Bain, 121 U.S. 1 (1886); United States v. Simmons, 96 U.S. 360 (1878); United States v. Cruikshank, 92 U.S. 542 (1876).

This rule has been fully embraced by this Court on numerous occasions. In United States v. Lamont, 236 F.2d 312 (2d Cir. 1956), this Court stressed:

"The deficiencies in the indictment now before us are thus quite fundamental and go far beyond the question whether defendants had been put on adequate notice. Rather, the question is whether

defendants are to be put to trial on an allegation which on its face charges no offense. . . . There is no allegation in the indictments here linking the inquiry conducted by the subcommittee to the grant of authority dispensed to its parent committee. In fact, on its face and taking judicial notice, as we must, of the pertinent legislation, the inference must be just the opposite. . . . We have the anomalous situation that the government is now attempting to hang on to and retain for trial indictments for offenses which it cannot support in law." (236 F.2d at 315-316)

Our case is no different, since here the government has prosecuted the defendants for a non-existent offense. It is preposterous to suggest that Congress intended to bring within the tentacles of this new federal gambling statute five persons who possessed ten or more policy slips. Such a proposal is incredible.

In People v. Fiedler, 31 N.Y.2d 176, 335 N.Y.S.2d 377 (1972), the New York Court of Appeals considered a situation similar to our own. There the prosecution charged the defendant with a non-existent crime. The court went into the legislative history of the particular section of the Penal Law and concluded that no such crime existed and accordingly dismissed the complaint.

The substance of an indictment cannot be modified by the prosecution, for it is the grand jury that determines the nature of the accusation, and not the United States Attorney. Significantly, other grand juries have charged state gambling provisions in §1955 prosecution which involve only the conducting of a gambling operation. United States v. Becker, 461 F.2d 230 (2d Cir. 1972) (§§225.05 and 225.10, both of which deal with the promotion of gambling); United States v. Fiorella, 468 F.2d 688 (2d Cir. 1972) (charged promotion of bookmaking in violation of §225.00 of the New York Penal Law); United States v. Alver Purks, et al., Docket No. 238-72 (W.D.N.Y. 1974) (charging the promotion of policy in violation of Article 225 of the New York Penal Law). This is the only case known to counsel where the government has drafted a defective indictment including a state possessory offense.

Clearly mere possession of policy slips does not come within the spirit or the letter of §1955 or its legislative history. Congress was only concerned with

the promotion of gambling and not persons who merely possessed gambling paraphernalia. Of even greater concern is the fact that the government's entire proof in this case dealt exclusively with the possessory offense. Virtually all other evidence related merely to certain individuals' possessing policy slips. As we will show later in this brief, there was never any proof of the promotion of policy as required by the New York cases construing §225.05.

The appellants were stunned when the trial court concluded:

"Even if the proof of the government were not sufficient to support a conviction of promoting gambling under §225.05 . . . the indictment may not be dismissed if proof is found to support violations of §225.15 alone (possession of policy slips.)"

The court, acting in direct defiance of the legislative history of §1955, held the indictment may be sustained if either statute (possession or promotion)

were violated. Such a ruling defeats the intent of §1955 and is contrary to the language of the statute.*

In United States v. Cioffi, 487 F.2d 492 (2d Cir. 1973), this Court, relying on §501's legislative history, concluded that the word "use" in connection with counterfeit postal stamps meant ". . . use for a postal purpose, not 'use' in a broader, colloquial sense." (487 F.2d at 499.)

* The trial judge's reliance upon United States v. Cioffi, 487 F.2d 492 (2d Cir. 1973), is misplaced. In Cioffi this Court held:

" . . . it appears settled that indictments worded in the conjunctive, charging violations of statutes worded in the disjunctive, can be supported by proof of either of the conjoined means of violating the act." (487 F.2d at 499)

Ours is not a case where both forms of conduct, promoting and possession, are charged disjunctively in the statute. Section 1955 never contemplated possessory offenses and accordingly the government has smuggled into this indictment a state offense which is foreign to the federal statute.

Accordingly, the Court reversed the defendants' convictions. Here the legislative history is even more obvious and militates against the court's interpretation below.

Surely the trial judge's misconstruction of §1955, as in the Cioffi case, would overtax this anti-gambling statute and would bring within its reach every person in the State of New York who may possess ten or more policy slips. Such a construction has vast implications, for it drags within the undertow of this law thousands of police court misdemeanors that should not be allowed to clog the busy calendars of our federal courts, whose personnel have been pushed to the edge of exhaustion by the high rise in serious federal crimes. And to impose felonious criminal responsibility upon those who could only be convicted of a misdemeanor in a state court is shameful. For all these reasons, the appellants' judgments of convictions should be reversed and the indictments dismissed.

POINT II

THE APPELLANTS, ANTHONY POLITI AND HARRY WEIS, RAISED THE DEFENSE OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL AS A BAR TO PROSECUTION UNDER THE INSTANT INDICTMENT SINCE IT EMBRACES PART OF THE TIME PERIOD OF A PRIOR SIMILAR INDICTMENT IN WHICH THEY WERE BOTH ACQUITTED (71 Cr. 857), AND SOME OF THE EVIDENCE PRESENTED HEREIN IS IDENTICAL TO THE EVIDENCE ADDUCED AT THE FORMER INDICTMENT. THE COURT SHOULD HAVE GRANTED THE MOTION TO DISMISS THE PRESENT CHARGES AS BEING VIOLATIVE OF THE CONSTITUTIONAL PROHIBITION AGAINST PLACING AN ACCUSED TWICE IN JEOPARDY UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES.

The defendants-appellants, ANTHONY POLITI and HARRY WEIS, had been indicted on similar charges involving a violation of 18 U.S.C. 1955 under indictment 71 Cr. 857. That indictment alleged a conspiracy which commenced on March 16, 1971 and terminated on May 24, 1971.

The instant indictment alleges a conspiracy commencing on or about September 1, 1970 and continuing until on or about January of 1973. It is, therefore, obvious that there is a substantial overlap between the two indictments.

In addition to the appellants, ANTHONY POLITI and HARRY WEIS, it should be noted that PHILIP POLITI was also indicted under 71 Cr. 857, and MICHAEL ROMAN and ALPHONSE

CUZZO were unindicted co-conspirators and accomplices according to a Bill of Particulars filed by the Government in connection with indictment 71 Cr. 857.

In addition, PASQUALE MASELLI was named as a defendant in 71 Cr. 857 and is named as a co-conspirator in the indictment in the case at bar. Thus it is obvious that there are many defendants or co-conspirators who are common to both indictments. The testimony of Acrel Simon and N. Brown concerning meetings with ANTHONY POLITI dating back as far as 1968 and September 1970, revealed how far back the Government was permitted to go, thereby antedating the conspiracy.

While it may be the Government's position that the testimony of Acrel Simon dating back to 1968, was germane to the instant indictment, it is obvious that it far antedates the commencement of the conspiracy. In fact, the entire period of the conspiracy of indictment 71 Cr. 857 is embraced within the present indictment.

If the foregoing facts were the only similarities, it would raise serious double jeopardy questions. But, actually, there are even more cogent reasons for the position taken by appellants. These include the fact

that there was a similarity of evidence in both cases to a significant degree. For example, it is stipulated by Exhibit 27 that twenty-four of the fifty-eight "runner codes" identified in seizures presented in the trial under indictment 71 Cr. 857 were found among the 175 runner codes identified in the so-called "Bobbin Inn" seizure in this case. Eleven of twenty runner codes found on the tapes seized from defendant PETERS and produced in evidence herein, were also adduced in evidence at the earlier trial.

The Court below found herein as well that some of the tapes seized at the Bobbin Inn appear to have related to operations in Rockland and Orange Counties, and others to Westchester County.

We should also point out that defendant-appellant FRANGELLO likewise has a double jeopardy claim because of the fact that he was convicted in a state case which embraced the transactions which were adduced in the case at bar.

The Fifth Amendment provides:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

"The constitutional prohibition against 'double jeopardy,'" says the United States Supreme Court, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." The Court explained:

"The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."
(Green v. United States, 355 U.S. 184)

The Supreme Court of the United States has held that the double jeopardy clause applies not only to state, but federal prosecutions as well (ASHE v. SWENSON, 397 U.S. 436 (1970)). ASHE v. SWENSON, moreover, reveals that the doctrine of collateral estoppel is now part and parcel of the double jeopardy prohibition of the United States Constitution. See also, HARRIS v. WASHINGTON, 404 U.S. 55 (1971).

This was a non-jury case, but, nonetheless, jeopardy attached as soon as the Court began to hear evidence

(GREEN v. UNITED STATES, 355 U.S. 184 (1957); CLAWANS v. RIVES, 104 F.2d 240 (D.C. Cir. 1939); 122 A.L.R. 1436).

The Supreme Court has also condemned harassment of the accused by successive prosecutions. Thus, in DOWNUM v. UNITED STATES, 372 U.S. 734, 10 L.Ed.2d 100, at 102, 103, the Supreme Court declared:

"Harassment of an accused by successive prosecutions...so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches."

We submit that the evidence herein reveals that there was a continuous crime and that the conspiracies were the same as that embraced in indictment 71 Cr. 857, thus precluding the trial of POLITI and WEIS certainly, and perhaps of the co-conspirators who are named in both indictments. The Supreme Court has stated that there may be but one prosecution for an offense which is continuous in character (See Re SNOW, 120 U.S. 274 (1887)). See also PEOPLE v. COX, 107 Mich. 435, 65 N.W. 283).

The Court below, we submit misinterpreted this Court's rulings with respect to collateral estoppel and double jeopardy.

In UNITED STATES v. KRAMER, 289 F.2d 909 (2 Cir. 1961), this Court rejected a governmental contention that collateral estoppel applies only to "an issue essential to a conviction in a second trial" (id. at 915). Judge Firendly, writing for the Court, explained:

"We see no basis in reason for a limitation so narrow. A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue. * * * [T]o permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614,-- and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in *Abbate v. United States*, 1959, 359 U.S. 187, 196, 201, 79 S.Ct. 666, 3 L.Ed.2d 729. The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, * * * to charge an acquitted defendant

with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be." *Id.* at 915-916.

See, *Yawn v. United States*, 244 F.2d 235 (5th Cir. 1957); *United States v. Simon*, 225 F.2d 260 (3rd Cir. 1955); *United States v. De Angelo*, 138 F.2d 466 (3rd Cir. 1943). See also, *United States v. Phillips*, 401 F.2d 301 (7th Cir. 1968)."

Chief Justice Shaw's famous formulation in *MOREY v. COMMONWEALTH*, 108 Mass. 433, 434 (1871), quoted with approval in *ex parte Nielsen*, 131 U.S. 176, 187-188, 9 S.Ct. 672, 33 L.Ed. 118 (1889); *Carter v. McClaghry*, 183 U.S. 365, 395, 22 S.Ct. 181, 46 L.Ed. 236 (1902); *Gavieres v. United States*, 220 U.S. 338, 342, 31 S.Ct. 421, 55 L.Ed. 489 (1911); *Ebeling v. Morgan*, 237 U.S. 625, 630-631, 35 S.Ct. 710, 59 L.Ed. 1151 (1915); and *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), namely, that "the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other," has been somewhat undermined,

If not actually overruled.

While the formulation has not been expressly rejected by the Supreme Court of the United States or this Circuit, it has been seriously criticized. See the separate opinion of Mr. Justice Brennan in Abbate v. United States, 359 U.S. 187, 196, 201, 79 S.Ct. 666, 3 L.Ed 2d 729 (1959); his concurring opinion, joined by Justices Douglas and Marshall, in Ashe v. Swenson, supra, 397 U.S. 448, 90 S. Ct. 1189; and Note, Twice in Jeopardy, 75 Yale L.J. 264 (1965). See also Mr. Justice Schaefer's Traynor lecture, Unresolved Issues in the Law of Double Jeopardy: Waller and Ashe, 58 Calif.L.Rev. 391 (1970). No small part of the difficulties in double jeopardy law is traceable to the fact that the same tests have been applied to acquittals and convictions, although the policy considerations relative to reprosecution are quite different.

While the Supreme Court has refrained from employing the MOREY formulation in such recent cases as United States v. Ewell, 383 U.S. 116, 124-25, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); Waller v. Florida, 397 U.S. 387, 390, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970); and Robinson v. Neil, 409 U.S.

505, 511, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973), in at least two cases, Petite v. United States, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960), and Marakar v. United States, 370 U.S. 723, 82 S.Ct. 1573, 8 L.Ed.2d 803 (1962), the Government has avoided testing the continued validity of the traditional formulation by requesting the dismissal of convictions that might have called for reconsideration of the Morey rule. The Government there insisted that its requests for dismissals were based, not on a violation of double jeopardy principles, but on its own policy "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement," 361 U.S. at 530, 80 S.Ct. at 451. In both Petite and Marakar, three Justices would have rejected the Government's "policy of fairness" approach and would have based reversal directly on the Double Jeopardy clause.

As was explained in footnote 5 by this Court in the case of UNITED STATES v. CIOFFI, 487 F.2d 492 (2 Cir. 1973) at 497:

"With the support of Justices Douglas and Marshall, Justice Brennan has continued to hammer away at the Court's reluctance to consider anew what constitutes the 'same offence' for double jeopardy purposes. Sounding a theme that originated with his separate opinion in Abbate and Ashe, he has pressed for adoption of a constitutional requirement of joinder for all charges arising out of a 'single criminal act, occurrence, episode or transaction,' in concurrences, see Simpson v. Florida, 403 U.S. 384, 387, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971); Harris v. Washington, 404 U.S. 55, 57, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971); Robinson v. Neil, 409 U.S. 505, 511, 93 S.Ct. 876, 35 L.Ed.2d 29 (1973), and in dissents from denials of certiorari, see Duncan v. Tennessee, 405 U.S. 127, 130, 92 S.Ct. 785, 31 L.Ed.2d 86 (1972) (writ dismissed as improvidently granted); Miller v. Oregon, 405 U.S. 1047, 92 S.Ct. 1321, 31 L.Ed.2d 590 (1972); Grubb v. Oklahoma, 409 U.S. 1017-19, 93 S.Ct. 450, 34 L.Ed.2d 309 (1972)."

In UNITED STATES v. SABELLA, 272 F.2d 206, 211 (2 Cir. 1959), this Court held in essence that the double jeopardy clause prohibited a second prosecution after a conviction stemming from the same narcotics transaction.

The SABELLA case is further explained in UNITED STATES v. CIOFFI, *supra*, 487 F.2d at 497, 498, where this Court declared:

"Although this court there reaffirmed the Morey doctrine, we refused to extend it to the point of rigid formalism. While the two charged offenses in Sabella each technically included one unique element, the Government was not required to prove either in order to make out a prima facie case. In effect, then, the same proof could support both convictions. In view of the shadow that has been cast over Morey, one is justified in speculating that, unless prosecutors take to heart the recommendations for joinder of all offenses arising out of the same criminal episode or transaction, double jeopardy will be a fertile ground for Supreme Court development in the next decade."

It must be borne in mind further that in the prior indictment herein, namely 71 Cr. 857, there was an acquittal on both counts, namely the conspiracy and the substantive count and, therefore, there was nothing surviving to present to another jury. (See UNITED STATES v. CIOFFI, supra, 487 F.2d at 498).

We recognize if there had been a disagreement on the conspiracy count in the first indictment, then our position herein might be different. (See UNITED STATES v. KRAMER, supra, 289 F.2d at 919. See also, UNITED STATES v. WILLIAMS, 341 U.S. 70 (1951) and YATES v. UNITED STATES, 354 U.S. 298 (1957)).

We most respectfully submit that the District Judge below erred in his ruling that double jeopardy and collateral estoppel did not bar reprosecution. He apparently misinterprets UNITED STATES v. KRAMER, supra, and quotes UNITED STATES v. BARZIE, 433 F.2d 984 (2 Cir. 1970), cert. denied 401 U.S. 975, which was a one page per curiam opinion, as authority for his position that jeopardy is not present.

In UNITED STATES v. McCALL, 489 F.2d 359, 362, (2 Cir. 1973), this Court interprets BARZIE as meaning that there were completely separate conspiracies and that the co-conspirators were different.

In the case at bar it is stipulated that many of the same dramatis personae are in both indictments and a number of pieces of evidence are common to both indictments. Thus the position taken by Judge Lasker, we maintain is untenable.

His conclusion that there are two distinct and separate conspiracies is not supported by the record which is stipulated to.

GAVIERES v. UNITED STATES, 220 U.S. 339, has been substantially undermined by later cases such as ASHE v.

SWENSON, *supra*, and BENTON v. MARYLAND, *supra*. (See UNITED STATES v. KRAMER, UNITED STATES v. SABELLA, and UNITED STATES v. CIOFFI, *supra*).

The Court below also cites BARTKUS v. ILLINOIS, 359 U.S. 121 in opposition to FRANGELLO's double jeopardy motion, interpreting it to hold that successive state and federal prosecutions based on the same transaction do not constitute double jeopardy.

We maintain, however, that BARTKUS is moribund since BARTKUS has been specifically overruled by the Supreme Court in BENTON v. MARYLAND, 395 U.S. 784 (1969). We urge that the "dual sovereignty" doctrine articulated in BARTKUS is no longer valid.

Similar reasoning has been rejected in subsequent decisions of the Supreme Court, e.g. MURPHY v. WATERFRONT COMMISSION, 378 U.S. 52 (1964). In MURPHY, *id.* at p. 68, the Supreme Court held:

"...no support for the conclusion that under the Fifth Amendment, 'the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty.'"

Justification of the Bartkus rule on the basis of

"federalism" is no longer possible. It is being recognized with increasing frequency that the state and federal governments must cooperate in many areas, that their spheres overlap, and that they have become partners in many ways, especially in the area of law enforcement. This was recognized by the Murphy Court, in its discussion of the policies underlying the Fifth Amendment privilege against self-incrimination. The Court there said (pp. 55-56),

"Most, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each.... This has become especially true in our age of 'cooperative federalism,' where the Federal and State Governments are waging a united front against many types of criminal activity."
(Emphasis added.)

We must also bear in mind that since this is a prosecution under the Organized Crime Control Act, that both state and federal offices cooperated in its prosecution. Accordingly, it is surprising that the prosecution or the Court below did not consider HOUSTON v. MOORE, 5

Wheat. 1 (1820), which demonstrates that there is an exception to the dual sovereignty doctrine in any event when two governments are attempting to prosecute a person for the same general act.

ANTHONY POLITI, for example, was also convicted in the state court with respect to his participation in the Bobbin Inn search and seizure incident wherein gambling paraphernalia was found.

It would be fatuous to suppose that both the state and federal governments were not jointly seeking convictions in the case at bar.

In HOUSTON, the Supreme Court held that "if the jurisdiction of the two courts be concurrent," then the judgment of either court might be "pleaded in bar of the prosecution before the other" (id. p. 31).

BARTKUS, it should be noted, recognizes the dual sovereignty exception expressed in HOUSTON (359 U.S. at 130).

But we emphasize that we do not urge that BARTKUS is good law since we believe that it is now moribund and the federal prosecution under the former indictment with

respect to ANTHONY POLITI and HARRY WEIS at least, is barred under the Fifth Amendment and, with respect to FRANGELLO, and POLITI and WEIS under the HOUSTON case and ASHE v. SWENSON, *supra*.

At page 13 of the Court's memorandum and verdict, it is interesting to note that the Court recites the fact that the Government offered to strike from the record certain evidence seized at the Bobbin Inn Motel (see page 88 of the Government's Post-Trial Memorandum).

This makes it obvious that the prosecution and the indictment were predicated upon improperly seized evidence and offering to strike this evidence after the trial is over, is completely improper and a violation of due process. Certainly the Court could not redact this from its memory since it is a mental gymnastic which could not easily be performed under any circumstances. (BRUTON v. UNITED STATES, 390 U.S. 123).

See American Bar Association Standards, The Prosecution Function and the Defense Function Sec. 6.1 (Approved Draft, 1971).

The United States Supreme Court has given some credence to the "same evidence test" by applying it in

other situations besides ASHE v. SWENSON. See BLOCKBURGER v. UNITED STATES, 284 U.S. 299 (1932).

In the case of In Re NIELSEN, 131 U.S. 176 (1889), the Supreme Court applied a transactional test holding that an initial conviction precluded prosecution for a second crime which required proof of different elements than were required in the first trial. The predicate of the Court's opinion was that the Government was attempting to punish defendant twice for essentially the same illegal conduct.

The fact that there was an acquittal in the first indictment does not disturb the general principle.

Cf. UNITED STATES v. JORN, 400 U.S. 479.

Thus, we urge that the Court should have dismissed the charges, against ANTHONY POLITI and HARRY WEIS, at least, under the foregoing authorities.

POINT III

THE APPELLANTS CANNOT BE CONVICTED OF CONSPIRACY SINCE CONCERTED ACTION OF MORE THAN FIVE PERSONS IS AN INDISPENSABLE ELEMENT OF THE CRIME OF SYNDICATED GAMBLING UNDER §1955 OF TITLE 18.

Lying uncomfortably close to the borders of due process is the trial court's failure to dismiss the conspiracy charge against the appellants under the ancient rule of this Circuit announced in United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943), and United States v. Sager, 49 F.2d 725 (2d Cir. 1931). The underlying rationale of these cases was stated in remarkably simple language by the late Judge Learned Hand in United States v. Central Veal and Beef Company, 162 F.2d 766 (2d Cir. 1947):

"What it does mean is that when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal action of the conspirators indicted, they may not be indicted for conspiring to commit it if they have in fact consummated it." (162 F.2d at 770)

Clearly the appellants come well within the reach of this rule, for under §1955 five or more persons must participate together in an illegal gambling

operation. In order for criminal liability to attach under this statute, they must act in combination and in concert. Thus, the virtue of this rule is that it avoids double punishment when the substantive offense itself contemplates an illegal agreement. The parties who act in concert should not be punished a second time for entering into the very same agreement merely because it is called a conspiracy.

Appellants' counsel complained about the misjoinder of charges at the conclusion of all the proof, relying upon Sager and Zeuli, supra, but the court rejected this objection.

This well-reasoned rule has flourished and has been extended to cases of bribery, Sager, supra; rebating of railroad charges, United States v. New York Central and H.R.R. Company, 146 F. 298 (Cir. Ct., S.D.N.Y., 1906); criminally receiving stolen property, United States v. Hagan, 27 F.Supp. 814 (W.D.Ky. 1939).

This principle was acknowledged by the United States Supreme Court, although not applied, in Gebardi v. United States, 287 U.S. 112 (1932); United States

v. Katz, 271 U.S. 354 (1926); and United States v. Holte, 236 U.S. 140 (1915).

Of course this principle is inapplicable when the offense can be committed by one of the co-conspirators alone or when those whose cooperation is necessary for the commission of the substantive crime conspire with another person to commit the offense.* However, here neither of these exceptions apply and thus it was a cardinal error, reaching due process proportions, for the trial court to compel the appellants to proceed to trial under both charges.

Even though no additional punishment was imposed on the conspiracy conviction, the prejudice to the appellants is obvious. Under the conspiracy charge the appellants were forced to wallow in a sea of evidence

* See Baker v. United States, 393 F.2d 604 (9th Cir. 1968); Reno v. United States, 317 F.2d 499 (5th Cir. 1963); United States v. Central Veal and Beef Company, 162 F.2d 766 (2d Cir. 1947); United States v. Corallo, 281 F.Supp. 24 (S.D.N.Y. 1968); United States v. Cogan, 266 F.Supp. 371 (S.D.N.Y. 1969); United States v. Anthony, 145 F.Supp. 323 (M.D.Pa. 1956).

channeled into their case through the conspiracy conduit. Had they only been required to go to trial on the substantive offense, this flood of evidence could have been stemmed. A whole avalanche of evidence was received against each of the defendants under the conspiracy theory, which would not have been admissible against them under the substantive charges. Consequently, it became virtually impossible for the judge to disentangle this evidence and treat the appellants separately, since he received all this evidence against each of them. Obviously his judgment of conviction was based upon all the evidence against each appellant.

We recognize that this Court rejected a similar claim made in United States v. Becker, 461 F.2d 230 (2d Cir. 1972), under somewhat different circumstances. However, that judgment was reversed by the United States Supreme Court in Becker v. United States, U.S. (May 28, 1974), although on other grounds, and this Court vacated the judgment on June 26, 1974.

Significantly, on May 28, 1974 the United States Supreme Court granted certiorari in Iannelli v. United

States, 42 U.S.L.W. 365, 15 Cr.L. 4063 on this precise issue. In Iannelli the defendant was convicted of both conspiracy and a violation of §1955 of Title 18. The question certified for hearing is:

"Whether petitioners' convictions of conspiracy represent a duplication of their convictions of violating 18 U.S.C. §1955, and require that the conspiracy convictions be reversed."

We urge that the appellants cannot constitutionally be convicted both of conspiracy to violate §1955 and a breach of the substantive provisions of that section. In view of the Supreme Court's recent action on this vital issue, we urge its reconsideration is warranted here and that the appellants' judgments of conviction should be reversed.

POINT IVSTATEMENT OF ANTHONY POLITI ANTE-DATING THE CONSPIRACY CHARGED IN THE INDICTMENT BY TWO YEARS SHOULD HAVE BEEN EXCLUDED.

One of the most prominent events in the trial occurred when the government stunned everyone by attempting to prove that Anthony Politi said to Acrel Simon, two years before the date of the indictment, that he was setting up a gambling business in Newburgh and discussed percentages and odds. Counsel strenuously objected to this evidence as being far outside the scope of the indictment and highly prejudicial. Judge Lasker overruled the objection and considered this evidence in convicting appellant Politi.

We are not here dealing with the vague contours of due process, but a rather precise rule formulated by this Court and strictly adhered to in an unbroken series of cases extending over a long stretch of this Court's history. That rule, simply stated, is:

"... evidence of another crime may be introduced if, and only if, it 'is substantially relevant for some other purpose than to show a probability'

that the defendant 'comitted the crime on trial because he is a man of criminal character.' " (United States v. Bozza, 365 F.2d 206, 213 [2d Cir. 1966])

This principle gains its primary impulse from a desire to shield defendants from the obvious prejudices flowing from a jury's consideration of other illegal acts totally unconnected with the charges included in the indictment.

Here there was never any proof which demonstrated in the slightest degree that these statements were connected with any gambling activities found to be in existence over two years later. Acrel Simon was in no way identified with this policy operation in the instant indictment.

In United States v. Birnbaum, 337 F.2d 490 (2d Cir. 1964), this Court carefully examined the infectious doctrine of prior similar acts or statements made outside the scope of the indictment and reversed the defendant's conviction. Birnbaum was indicted for conspiring to bribe an Internal Revenue agent. While cross-examining a co-conspirator, defense counsel sought to minimize the scope of Birnbaum's relationship to him. The government, on redirect, elicited testimony that Birnbaum had recom-

mended an attorney to "help straighten out" a matter concerning the New York State Attorney General. The witness testified the matter pending before the Attorney General was quashed through Birnbaum's assistance. This Court concluded that there was no proof that the Attorney General "dropped" the matter because of any improper conduct on the part of the attorney. The Court recognized that the presumption should be that the attorney presented good and sufficient arguments in support thereof. Finally, the Court, recognizing the severe prejudice of this type of testimony, and using passages of harsh strength, declared:

"It would indeed deprive defendants of fair trials on the issues relevant to the specific charges against them if juries were allowed to draw **unwarranted** inferences from such unrelated, irrelevant matters." (337 F.2d at 497)

Birnbaum offers a precise and controlling rule for our case. Here, as in Birnbaum, the government offered evidence of an incident "totally irrelevant to the crimes charged." Here, as in Birnbaum, there was no proof whatsoever that the suggestion made by Politi to Acrel Simon was ever fulfilled or carried out. And finally, here, as

in Birnbaum, the result of admitting this inflammatory evidence irreparably prejudiced the appellant's case before Judge Lasker. It is undisputed that he considered this proof in finding him guilty.

This Court has on occasion approved the admission of this specie of evidence where the defendant took the stand and raised collateral issues. United States v. Keilly, 445 F.2d 1285 (2d Cir. 1971); United States v. Glasser, 443 F.2d 994 (2d Cir. 1971); United States v. Vivero, 418 F.2d 971 (2d Cir. 1969); and United States v. Cuadrado, 413 F.2d 633 (2d Cir. 1969). However, that is not the situation in our case.

This proof was particularly prejudicial since the government had no evidence of wrongdoing on the part of Anthony Politi.

Despite repeated warnings from this Court, prosecutors continue to exploit this form of unlawful evidence. Until they are taught once and for all that these tactics will not be tolerated, no defendant is secure. A reinforcement of this doctrine is badly needed, or prosecutors who come within the reach of this Court's voice are bound to resort to this tactic of convicting defend-

ants of things for which they have not been charged. If equal protection of the law is to have any meaning at all, the appellant's conviction must be reversed in the same way this Court set aside the conviction of Arthur Birnbaum.

POINT V

THE GOVERNMENT FAILED TO PROVE THAT
FIVE OR MORE PERSONS COMBINED TO PRO-
MOTE GAMBLING IN VIOLATION OF SECTION
225.05 OF THE NEW YORK PENAL LAW.

The government failed to sustain its burden of proof in proving a violation of §225.05 of the New York Penal Law. The government was obliged to prove, beyond a reasonable doubt, that five or more persons conducted an illegal gambling business by promoting a policy operation. Under the New York cases, a conviction for promoting policy must be supported by some proof of the actual acceptance of wagers, and cannot depend exclusively on mere possession of policy records. Furthermore, the government failed to prove, as required by New York law, the happening of a contingency upon which the wager was based. And finally, the prosecution was unable to produce conclusive proof that some of the defendants pos-

8
sessed the policy records offered in evidence. Each of these complaints will be discussed separately.

Failure to Prove the Promotion of Policy

The most the government proved in this case, giving it the benefit of the doubt, is that the appellants were engaged in some ministerial acts in a gambling operation. There was absolutely no proof that any appellant accepted policy wagers. The most the government's proof demonstrated was that Gerald Politi, Philip Politi, Harry Weis, Leonard Harrison and Michael Camporeale were merely messengers. And in a few instances, some appellants were arrested with policy slips in their possession. However, under New York law that was insufficient to sustain a conviction of promoting policy. People v. Politi, 19 N.Y.2d 623, 278 N.Y.S.2d 407 (1967); People v. Abelson, 309 N.Y. 643 (1966); People v. Dickerson, 54 Misc. 2d 436 (1967).

There was no proof that the appellant Anthony Politi accepted wagers relating to policy. For instance, in both the Becker and Fiorella cases, supra, the government produced evidence of the actual acceptance of wa-

gers through either betters who testified or through the use of electronically intercepted telephone conversations which revealed betting transactions.

In People v. Politi, 19 N.Y.2d 623, 278 N.Y.S.2d 407 (1967), the New York Court of Appeals reversed a conviction and dismissed the indictment under circumstances almost identical to those in this case. The facts of that case are most relevant and are as follows:

"The People offered testimony that on January 28, 1963 the police had obtained a warrant authorizing a search of a defendant, who had been the subject of police surveillance for several days prior thereto, and that on that date named person parked his automobile near parked automobile of defendant, walked to defendant's automobile, got into it, and handed defendant a white envelope, and that defendant then removed money from the envelope, and that defendant then removed money from the envelope, counted the money, and put it in his pocket and that named person then left defendant's automobile and returned to his own automobile, and that the named person and the defendant then drove away and a few minutes later parked near each other at a different location. . ." (19 N.Y.2d at 623)

The police then executed a search warrant and found \$265 in the defendant's pocket, an empty unmarked white envelope on the car's floor, and a policy record of a

runner in an ashtray. They also found a quantity of policy slips in the car. The proof showed that before January 28, 1973 the defendant had similar transactions with others on different occasions. On one of the other occasions he had thrown a quantity of policy slips out the window of an automobile.

Holding this proof insufficient to establish the crime of promoting policy (under §225.05's predecessor, §974 of the New York Penal Law), the Court in a memorandum opinion reversed the conviction and dismissed the charges, emphasizing:

"The proof presented by the People failed to establish beyond a reasonable doubt that this defendant violated the provisions of section 974 of the Penal Law as charged in the information." (19 N.Y.2d at 624)

Under these well-defined rules it is clear under New York law it is absolutely essential that the prosecution prove, beyond a reasonable doubt, the actual promotion of policy bets. The government is bound by that rule and failed to meet that high standard. All the prosecution proved here, under the most questionable circumstances, was the picking up of some policy slips and

the possession of policy records, which, as we have pointed out earlier in this brief, does not fall within the scope of the federal statute.

Failure to Prove Conclusively that
the Appellants Possessed Policy Slips

We have already urged that under §1955 it was never Congress' intent to include within the ambit of that provision the possessory gambling offenses, but only those crimes which involve the actual promotion of gambling. This argument is not meant to detract from that claim, but is offered primarily to show that the evidence of possessing the policy records received in evidence was insufficient to establish the crime of promoting gambling.

Each of the appellants were charged with violating §225.15 of the New York Penal Law, which provides that a person is guilty of the possession of gambling records when he knowingly possesses any writing of the kind commonly used in the operation of a policy enterprise. Under this section of the state law there is no legal presumption that a person found in the same room with

policy slips is presumed to possess those items. Under New York law, whenever possession is made an offense, it is essential that the prosecution establish the defendant's possession "conclusively." In an endless line of cases extending over a long stretch of the New York Court of Appeals' history this proposition has been held postulate.

In People v. Wolosky, 296 N.Y. 236 (1947), the Court of Appeals decided that when "mere possession, without more, is made a criminal offense, it is of course essential that defendant's possession be conclusively shown (296 N.Y. at 238).

Three years later, the same Court reaffirmed its position in Wolosky in People v. Leavitt, 301 N.Y. 113 (1950). There two men had been arrested in the rear of a truck containing a large number of lottery tickets. One of the men was charged and convicted of the crime of possession policy slips in violation of §974 of the Penal Law. Once again the Court of Appeals emphasized in unmistakable language the following:

"It is not disputed that the papers in the boxes were policy slips. Since possession in itself is made a criminal of-

fense it is essential that defendant's possession be 'conclusively' shown. [Court's emphasis.] . . . To put it in another way it must be conscious possession." (301 N.Y. at 116)

In both the Wolosky and Leavitt cases, the Court had before it the same type of statute involved in the case at bar. Each of the sections charged against the defendant provide that "mere possession" of the proscribed items is a crime. In both the Wolosky and Leavitt cases there were provisions under the gambling article making possession presumptive evidence of knowing possession. In Wolosky the Court of Appeals committed itself irrevocably to the following definition of possession.

"We consider that Section 974, when it speaks of 'possession' means possession in fact, physical possession, actual custody or control of the articles of personal property capable of being physically held." (296 N.Y. at 239; emphasis supplied.)

Wolosky and Leavitt are remarkably similar to the case at bar in that there is absolutely no proof here that five or more defendants actually possessed any of the papers offered in evidence. See also, People v. Russell, 34 N.Y.2d 261 (1974); People v. West, 237 N.Y.S.2d 978 (1963); People v. Mitchell, 237 N.Y.S.2d 775 (1963);

People v. Gerardi, 5 A.D.2d 993, 173 N.Y.S.2d 302 (1958);
People v. Gogarty, 5 A.D.2d 413, 172 N.Y.S.2d 734 (1st
Dept. 1958).

Here the evidence of possession of gambling records was clearly insufficient as it relates to the seizures at the Bobbin Inn (Anthony Politi); 77 Broadway in Parkridge, New Jersey (Michael Roman); the seizures made from the automobile at Tompkins Avenue and Sawmill River Parkway in Yonkers, New York (Anthony Politi, Robert Peters, Michael Roman); and 15 East View Avenue, Yonkers, New York (Alphonse Cuzzo).

The state violation covered by §1955 must be committed by five or more persons, and thus the policy slips possessed must be actually possessed by five or more persons. Under the legal definition of possession in New York, only one person can possess gambling records. People v. Wolosky, supra; People v. Leavitt, supra. Thus, if two persons are in an automobile, only one person can actually possess the gambling paraphernalia. As a consequence, under all the circumstances of this case, the government has failed to prove a violation of §225.15 of the New York Penal Law, and therefore the indictment must be dismissed against each of

the appellants.

Failure to Prove Sporting Event

In People v. Abelson, 209 N.Y. 643 (1956), the Court held that the corpus delicti of a gambling crime is the actual acceptance of the wager upon the outcome of a sporting event.* Section 225.00 of the New York Penal Law provides that for policy to be a crime it must be based on the outcome of a future contingent event unre-

* The Court of Appeals stressed in Abelson:

"There is no proof in this record that on the day set forth in the indictment (a) any horse races were run; (b) the names mentioned in the conversations were the names of horses; (c) any such horses were entered or ran in races on such dates; (d) any baseball games were played on the dates designated, or (e) any boxing matches were staged on such dates or that the names heard in the conversations were the names of participants who engaged in such boxing matches." (309 N.Y. at 650)

lated to the particular scheme.*

The government's theory of prosecution here is based upon the outcome of a sporting event, i.e., the final three numbers on the pari-mutuel machines of the race track operating in New York or elsewhere. Consequently, it is an essential element of the crime that the government prove the sporting event, or events, which comprise the number upon which the chances are taken. See People

* Section 225.00 of the New York Penal Law provides in part:

"11. 'Policy' or the 'numbers game' means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme."

v. Abelson, supra.* The statute quoted below in the footnote, confirms our claim that the prosecution must prove the sporting event. Since the government failed either to produce a daily newspaper showing the racing events upon which the pari-mutuel number is derived or the running of the races, they have failed to establish an essential element of the crime. As a consequence, the indictments against all of the appellants should have been dismissed.

Significantly, in United States v. Michael Leo Fiorella, et al., (Docket No. 1971-45, W.D.N.Y. 1971), aff'd., 468 F.2d 688 (2d Cir. 1972), the Hon. Harold P. Burke of the United States District Court for the Western

* To ease this burden of proof, the New York State Legislature created §225.35, which provides in part:

" * * *

2. In any prosecution under this article in which it is necessary to prove the occurrence of a sporting event, a published report of its occurrence in any daily newspaper, magazine or other periodically printed publication of general circulation shall be admissible, in evidence and shall constitute presumptive proof of the occurrence of such an event."

District of New York, on March 8, 1972, instructed the jury that the government was required to prove the sporting event in a gambling case.*

When the Fiorella case was heard in this Court, during the course of oral argument Judge J. Joseph Smith acknowledged that this instruction may well have been the basis of the acquittal on the substantive offense, for in the Fiorella case the defendants were only convicted of the conspiracy charge. We urge that three members of this Court at least acknowledged this element of proof and concluded that it may well have been the basis of the acquittal on the substantive offense.

The government's failure to establish this critical element of the crime was fatal to their prosecution and should require this Court to reverse the convictions of the appellants.

* Specifically, Judge Burke advised the jury:

"In this case the government is required to prove that the sporting events upon which the bets were allegedly made were actually performed; that is, that horse races which were actually bet on, were run; and that basketball games and hockey games were played."

POINT VI

APPELLANTS' FOURTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE:

(A) THE WARRANT FOR 77 BROADWAY, PARK RIDGE, NEW JERSEY, FAILED TO ADEQUATELY DESCRIBE THE PREMISES;

(B) ALL THE WARRANTS AND THE ARREST OF APPELLANT ROMAN WERE INVALID BECAUSE THEY WERE BASED ON:

- 1) DOUBLE HEARSAY;
 - 2) UNRELIABLE INFORMANTS;
 - 3) "STALE" INFORMATION; AND
 - 4) THE AFFIANT'S UNSUBSTANTIATED
- CONCLUSION THAT \$1955 WAS BEING VIOLATED.

The threshold question presented by this appeal involves serious issues concerning the constitutional validity of the search for and seizure of the evidence which formed the basis of the appellants' convictions. Virtually all the evidence presented against the appellants came from searches conducted pursuant to search and arrest warrants issued on June 1, 1972 for the search of premises at 77 Broadway, Park Ridge, New Jersey, and Michael Roman; and premises at 15 Eastview Avenue, Yonkers, New York, and the arrest of other appellants.

The Broadway warrants (including the arrest warrant for Michael Roman) were issued on the affidavit of Special Agent Reutter dated June 1, 1972, while the Eastview warrants (including the arrest warrant for Michael Roman) were issued on the affidavit of Special Agent Reutter dated August 28, 1972. For the convenience of the Court and since the issue of the validity of the two sets of warrants turns on many of the same questions (e.g., stale probable cause, reliability of informants, etc.) we will consider both sets of warrants under appropriate subheadings.

Particularity of Description

1. Broadway Warrants

The description in the warrant for 77 Broadway, Park Ridge, New Jersey, described those premises as "A TWO-STORY ONE FAMILY RESIDENTIAL DWELLING" (emphasis added).

It is undisputed--and the government has so stipulated--that 77 Broadway is a two-family dwelling and has been registered as such with the Building In-

spectors Office in Park Ridge, New Jersey since 1959. It is also undisputed and uncontradicted that the premises had separate mailboxes, utilities, telephones and entrances.

At this point in the history of the fourth amendment it is clear that a search warrant must particularly describe the place to be searched so that the executing officer will know "where to go and what to enter."

United States v. Fitzmaurice, 45 F.2d 133, 135 (2d Cir. 1930).

In Fitzmaurice the Court upheld a search warrant for a building "at 103 Temple Street" which building was in fact located behind "103 Temple Street" and was without a street number. Judge Learned Hand reasoned that by following the complete description in the warrant "one must reach a proper building, about whose identity there can be no doubt . . ." 45 F.2d at 135.* See also, United States v. Falcone, 109 F.2d 579 (2d

* The question of the number of apartments or units was not present in Fitzmaurice.

Cir. 1940), aff'd, 311 U.S. 205; United States v. Pisano, 191 F.Supp. 861 (S.D.N.Y. 1961).

Certainly our case is distinguishable, for here we have a situation where one might know "where to go," but by virtue of the fact that there are two dwelling units, one could not know, from the description, "what to enter."

The trial court, in rejecting defendants' arguments, placed heavy emphasis upon the need for "practical accuracy" and relied heavily on this Court's decision in United States v. Santore, 290 F.2d 51 (2d Cir. 1960). We do not quarrel with the need for only "practical accuracy" to meet the particularity requirement. We submit, however, that the court has completely misinterpreted that term and has misread this Court's decision in Santore, supra.

Santore involved a building which "to all outward appearances [was] a one-family house with a front door and a side door, and [which] had always been registered with the local authorities as a one-family dwelling."

(209 F.2d at 67.) As a means of deceiving the authorities, the defendant Santore had surreptitiously changed the building to a two-family dwelling. When he attempted to rely on this deception to void the warrant, this Court properly rejected his argument.

As stated earlier, the dwelling here was publicly registered as a two-family dwelling with separate mailboxes, utilities, telephones and entrances. In answer to this the trial court argued (1) that the fact of upper and lower entrances is consistent with its being a one-family dwelling as well as a two-family dwelling; (2) that neighboring houses "appear" to be one-family houses; (3) that the utility meters were not visible; (4) and that because "Roman had previously been convicted of bribing a State Policeman [the agents] had reason to believe that if they consulted the records their action might cause a leak fatal to the investigation.*

* We note that the trial court failed to consider the fact of separate mailboxes and separate telephone services.

The first and second arguments are refused in their repetition. The third argument is similarly implausible. Separate electrical service not only requires separate meters but also separate service wire entrances which are visible--and noticeable in a neighborhood of one-family houses with single service wire entrances.

The fourth argument upon which the court relies so heavily to counter the fact that the government should have known about the double occupancy is also without merit. We submit that the carelessness of the physical surveillance of the building must lead to the conclusion that the agents never attempted to determine the type of dwelling from the public records. However, assuming without conceding the validity of this argument, it is submitted that the information could have been obtained from the public records without disclosing the identity of the inquirer and by requesting information on several dwellings or an entire street, block or neighborhood. Other possibilities would be street directories, deeds

and the records of the utility and telephone companies. The government must be charged with knowledge of the fact of double occupancy. 290 F.2d at 67. See also United States v. Esters, 336 F.Supp. 214, 219-221 (E.D. Mich. 1972). All that was necessary to satisfy fourth amendment requirements was a routine investigation which would have disclosed that 77 Broadway was a two-family dwelling.

To hold that the warrant here described the premises with "particularity" or even "practical accuracy" would be to in effect overrule Santore and seriously depreciate the protections secured by the fourth amendment. Gouled v. United States, 255 U.S. 298, 304 (1921).

Double Hearsay

Most of the facts alleged in the affidavits for both the Broadway and Eastview warrants were obtained from informants identified as "Informant Number One" and "Informant Number Two". The government has conceded that Special Agent Reutter never contacted "Number Two". Therefore he was unable to vouch for

his reliability.

While the government has stated that Reutter did contact "Number One" (1) that fact was not apparent from the affidavit and (2) in the affidavit for the Eastview warrant Reutter admits that the informant obtained his information from someone known to the informant as "Hoke Roberts".

It is impossible to determine whether the other agents who allegedly acquired the information attributed to "Informant Number Two" in each of the affidavits, had themselves received the information personally from this informant or whether one agent relayed still another agent's information, etc., until it was finally relayed to Reutter. Consequently, if it turned out that a confidential informant was either nonexistent or not reliable, Reutter would not suffer the sanctions of perjury. See United States v. Pearce, 275 F.2d 318 (7th Cir. 1960).

Thus, the informants' allegations amount to nothing more than "double hearsay" as far as the issuing

magistrates are concerned.

Here, the procedural safeguard of perjury was nullified and avoided by the clever device of straining the fruits of probable cause through an agent who had no personal knowledge of the facts which formed the basis for the warrants.

While we recognize that hearsay may be the basis of a warrant, United States v. Ventresca, 380 U.S. 102 (1965), Jones v. United States, 357 U.S. 493 (1958), judicial approval of the procedure followed here will make a mockery of the affidavit requirement of the fourth amendment.*

This Court considered this issue in United States v. Ramirez, 279 F.2d 712 (2d Cir. 1960), and assured us that "the requirement that the affiant shall have personal knowledge still exists . . ." 279 F.2d at 715. There, this Court upheld the warrant because the affiant had personal knowledge. In our case, however, the affiant had no per-

*The procedure followed here was condemned in United States v. Ventresca, 324 F.2d 864 (1st Cir. 1963). The Supreme Court reversed only because it read the affidavit differently.

sonal knowledge and could not demonstrate the informants' reliability.

Furthermore, there was absolutely no corroboration of the double hearsay. For the mere surveillance of certain named individuals going in and out of various houses and meeting with various other people without more, has been held to be insufficiently corroborative of gambling activity. United States v. Spinelli, 393 U.S. 410 (1969).

Recently this Court clearly stated that "double hearsay" must not be encouraged and warned that it "necessarily reduced the magistrate's ability to make an independent determination of the information's reliability" United States v. Fiorella, 468 F.2d 688, 692 (2d Cir. 1972).*

Furthermore, since there was no corroboration of the double hearsay, the informants should have been disclosed. United States v. Robinson, 325 F.2d 391

*Fiorella is distinguishable from the case at bar in that there the affiant personally participated in the surveillance and the allegations made in the affidavit were substantially corroborated.

(2d Cir. 1963). The cloak of anonymity is an invitation to lie even about the existence of the informer let alone his reliability.

The unpardonable tactic of piling hearsay upon hearsay in this case requires the invalidation of the warrants. If we approve these practices in exchange for a handful of evidence to secure a conviction of a few alleged gamblers, we will have paid an enormous price-- a price we simply cannot afford if the constitutional safeguards embodied in our system of justice are to remain real.

Reliability of Informants

Because of the extensive use of informants it is necessary to evaluate the sufficiency of their information with regard to other allegations in the affidavit. The test used in this evaluation is two-pronged: (1) the prior reliability of the informant must be established and (2) the circumstances supporting the informant's conclusions as to probable criminal activity must be shown. Aquilar v. Texas, 378 U.S. 108 (1964);

Spinelli v. United States, 393 U.S. 410 (1969). See also United States v. Manetti, 309 F.Supp. 174 (D.Del. 1970).

1. Broadway Warrants

Assuming for the sake or argument that the first prong of the test has been satisfied, it is clear the second prong has not. For example, paragraphs 5 and 6 set forth information allegedly acquired by the informants through personal contact but it is set out in broad and vague terms with no dates or times given for the conversations. Contrary to the holdings in Aquilar and Spinelli, the informants' conclusions are used to establish probable cause unsupported by sufficient facts.

Clearly this information attributed to the informants does not meet the Aquilar standard that the magistrate be supplied with "some of the underlying circumstances from which the informant . . ." draws his conclusions. Aquilar v. Texas, supra, 378 U.S. at 114.

Nor is this defect remedied by the FBI surveillances. Paragraphs 8 through 13 allege "meetings", "spots", "runners", "policy gambling work" being taken to "spots" without facts which would enable a magistrate to share in the conclusion that these "meetings" and other activities are related to gambling. They amount to no more than conclusions by the agents which in no way corroborate the informants.

In Spinelli v. United States, 393 U.S. 410 (1969), the court discussed the effect of similar FBI observations determining the existence of probable cause and stated that they " . . . contained no suggestion of criminal conduct when taken by themselves--and they are not endowed with an aura of suspicion by virtue of the informer's tip." 393 U.S. at 418. Clearly the innocuous conduct observed by the FBI agents in this case can lend no support to a finding of probable cause for the issuance of the warrants in question.

2. Eastview Warrants

For the sake of argument we will assume without

conceding that here also the first prong of the Aguilar test has been met. However, the second prong of that test has not been satisfied.

The principal defect is the fact that the informer relies on information given him by "Hoke Roberts" over a period of two years or shadowy figures described only as "these men". This technique is as fatal here as it was in Spinelli because the informant has only indirect information and " . . . he did not explain why his sources were reliable" 393 U.S. at 416.

With respect to surveillances which could possibly lend credence to the informant's tale, there is no more here than was present in the affidavit for the Broadway warrant. Clearly, the mere conclusions in the affidavit neither corroborate the informant nor establish probable cause independently.

The unreliability of the informants in both affidavits as already demonstrated is not altered by the recent decision in United States v. Harris, 403 U.S. 573 (1971).

Harris can be distinguished in two important aspects. First, the court found that the informant there was speaking against his penal interests and therefore this lent credibility to his information, 403 U.S. at 583. In the case at bar the informants made absolutely no statements against their interests, penal or otherwise.

Secondly, in Harris the information supplied was much more detailed than that supplied here in that the informant described premises and activity observed precisely. 403 U.S. at 575. Clearly, such detail is lacking in the case at bar. In neither affidavit does the informant describe the premises or detail any personal observations of gambling activity. They do not state that they placed a bet, saw a betting slip or heard a phone ring.

For the above reasons, the reliability of the information attributed to the informants has not been adequately demonstrated and, therefore, this information is insufficient to establish probable cause

for the warrants in question.

Stale Probable Cause

The Supreme Court has held that facts alleged in an affidavit in support of a search warrant must be ". . . so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210-211 (1932). Under this rule most of the information supplied as probable cause for the warrants here was "stale".

1. Broadway Warrants

These warrants were issued June 1, 1972. Beginning with paragraph 5 of the affidavit it is stated that the informant obtained his information in May 1972. Therefore, it is entirely possible that this information is at least one month old. Similarly, paragraph 6 outlines the information given by "Informant Number Two", but there is absolutely no date given as to when this information was acquired, and therefore its vintage

is entirely unknown. Paragraph 8 states that "since the 13th of January" observations have been made. There is no indication as to when these observations were terminated and therefore the magistrate did not know the age of the information.

2. Eastview Warrants

These warrants were issued August 28, 1972. In the affidavit in support of these warrants, the information of "Informant Number One" in paragraphs 6 and 6(a) is undated, and it is only stated that these conversations have occurred over "the past two years", and "on several occasions during the past five months". There is no statement that these alleged activities have continued up until the issuance of these warrants and therefore it must be assumed that this information is "stale".

Paragraph 7 of the affidavit outlines the information attributed to "Informant Number Two", but nowhere is there an indication as to the age of the information except that these conversations have occurred

on occasions "for several years".

Moreover, the FBI observations detailed in paragraph 8 occurred 7 months prior to the issuance of the warrants. And, in paragraph 10 over 1 1/2 months; in paragraph 11 over 7 years; in paragraph 15 over 2 1/2 months; and in paragraph 16 over 3 months. Surely this information cannot lend weight to a finding of probable cause for the issuance of these warrants issued on August 28, 1972.

Rule 41(d) of the Federal Rules of Criminal Procedure requires that: "The warrant may be executed and returned only within ten (10) days after its date." The reason for this rule is manifest--our courts know from experience that the expiration of time reduces proportionately the likelihood that the alleged criminal activity will still exist in the place suspected. Probable cause evaporates with the passage of time.

Indeed, this was the basis of the court's decision in Sgro, supra. There a search warrant, for which probable cause existed at the time, was issued on July 6, 1926. It was not executed within the ten days required

by Rule 41(d) and on July 27, 1926--21 days later--the warrant was taken back to the Commissioner and redated from July 6 to July 27. No further evidence was taken to the Commissioner to determine whether probable cause existing on July 6 also existed on July 27.

Thus the court held that what began perhaps as a spark of probable cause was ultimately extinguished by the lapse of 21 days between the issuance of the warrant and its final execution. Thus, the rule is well settled that when probable cause becomes "stale" it is no longer available for purposes of obtaining a warrant. See Durham v. United States, 403 F.2d 190 (9th Cir. 1968).

The court below relies upon this Court's decision in United States v. Fitzmaurice, supra, in dismissing this argument. First we note that the holding there predated Sgro by two years. We also note that the time span in that case was measured from the date of the facts to the "execution" rather than the "issuance" of the warrant. United States v. Fitzmaurice, supra, 45 F.2d at 134.

When the information is based on hearsay as in our case, there should be some indication that it was imparted to the affiant at or shortly before the time of application, and an indication that the information supported a finding of probable cause at the time of the application, not five or six days or months previously. Coyne v. Watson, 282 F.Supp. 235, 237-238 (S.D. Ohio 1967). See also Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); Schoeneman v. United States, 317 F.2d 172 (D.C.Cir. 1963); Conti v. Morgenthau, 232 F.Supp. 1004 (S.D.N.Y. 1964).

For these reasons it is submitted that the information contained in the affidavits here, which is undated and which was acquired long before the warrants were issued should not be considered in judging the existence of probable cause in that there is no way of knowing if the events detailed are continuing.

Probable Cause

1. Broadway Warrants

These warrants are based upon alleged violations

of §§1084 and 1952 of Title 18. The arrest warrant is supported by a complaint alleging the necessary elements including the transmission of wagering information in violation of §1084. The complaint is based upon the June 1, affidavit relied upon to establish probable cause for the search warrant.

With respect to a violation of §1084 there is absolutely no reference to the transmission of wagering information by wire in either the complaint or affidavit. Even in the general paragraph detailing the workings of the average gambling operation no mention is made of the necessity to use telephones.

In order for a search warrant to issue in a §1952 case it must be shown that there is probable cause to believe that a violation was occurring and the evidence to be seized will be found at the particular premises. It must be shown that there was interstate travel for the illegal purpose.

Even if we assume all of the information in the affidavit to be true and current, it does not support a finding of probable cause under §1952 for these

warrants.

The only statements even remotely bearing on the issue of interstate activity are contained in paragraphs 5 and 12. In paragraph 5 it is alleged that Roman stated to the informant or some other person that he would not do policy work in New York. In paragraph 12 it is alleged that Roman visited 77 Broadway on four days in May, 1972. Absent any statement indicating that gambling activity was occurring there, there can be no justification for the conclusion that the interstate requirement of §1952 has been met.

2. East view Warrants

In order for a search or arrest warrant to issue for these premises there must be probable cause to support the belief that there was a violation of 18 U.S.C. §1955 involved. Thus it must be shown that the elements of this crime are present.

Again, even if we assume the validity of the affidavit, it does not support a finding of probable cause under §1955 for an arrest of Michael Roman and

a search of these premises.

The only statements in support of the search warrant are that two individuals met five or six times and that one of them went to 15 Eastview (¶¶13-14). There is no statement that they met to conduct gambling activity or that gambling activity was ever observed at 15 Eastview.

Furthermore, with regard to the arrest warrant there is no information that Roman was acting in concert with five or more persons in conducting an illegal gambling business in excess of 30 days or having a gross revenue of \$2,000 in a single day. In this regard we call the Court's attention to the detailed information supplied to the court in United States v. Williams, 459 F.2d 909, 912 (6th Cir. 1972) in a similar situation. There the court upheld the warrant over a vigorous dissent because the police possessed concrete evidence of betting activity through observation, participation and wiretaps.

In judging the affidavits of both Broadway and

Eastview we respectfully ask this Court to observe the rule that the issuing magistrate must not " . . . accept without question the complainant's mere conclusions that the person whose arrest is sought has committed a crime". Giordenello v. United States, 357 U.S. 480, 486 (1958). We submit that if, as here, that rule is not followed the issuing magistrate is nothing more than a "rubber stamp" for the government. Aguilar v. Texas, supra, 378 U.S. at 111; Johnson v. United States, 333 U.S. 10, 13-14 (1958).

A strict adherence to the rules fashioned by this Court governing the issuance of search warrants and authorizing arrests must be maintained if the cherished right of privacy in a free society is to remain real. Decisions which condemn the irregular police practices engaged in here act to protect the security of the entire community. They serve as a safeguard against the most terrifying symbol of a police state, the unauthorized intrusion into the homes and privacy of citizens by policemen who have become masters,

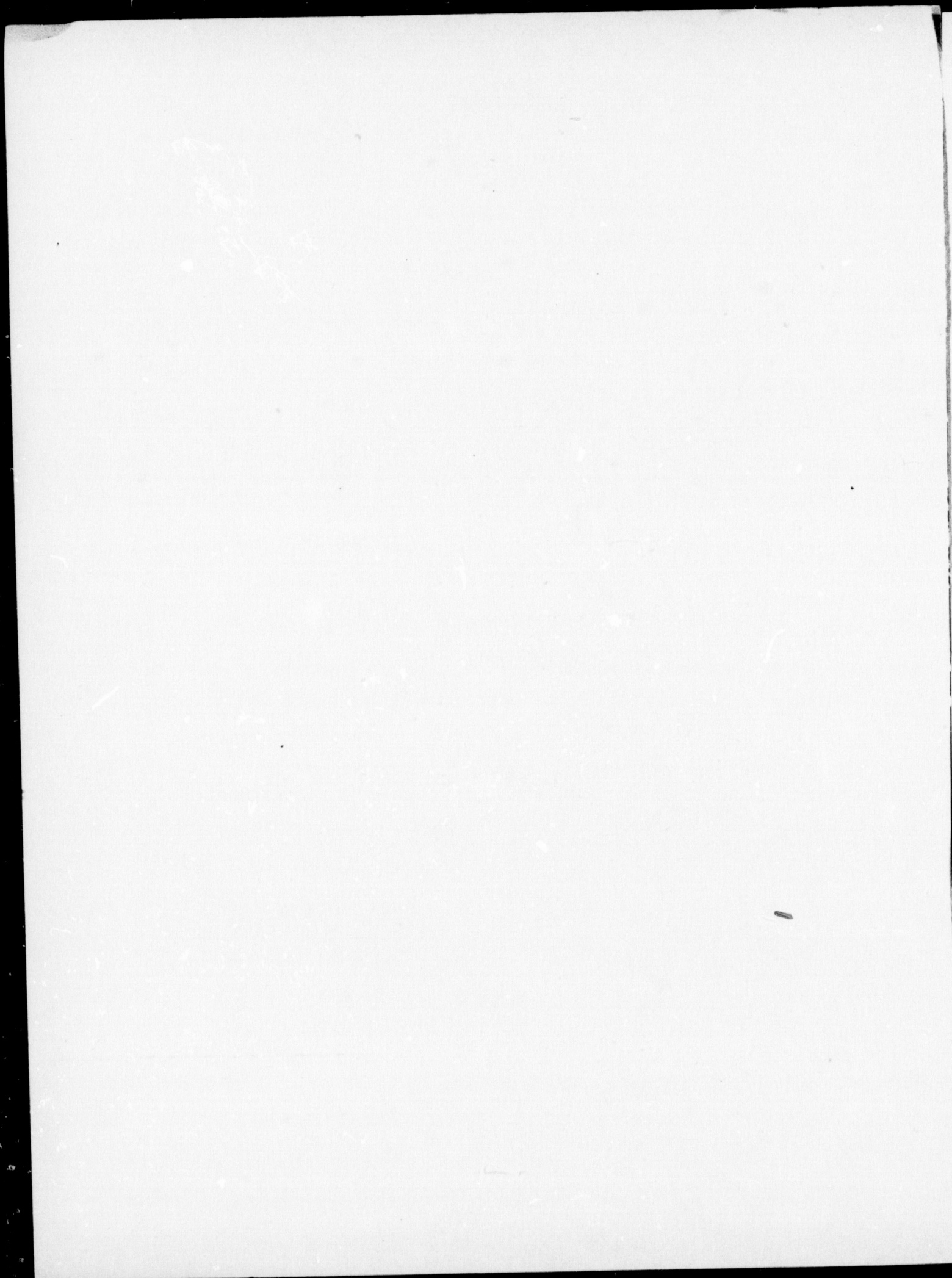
rather than servants, of the law. When we become indifferent to the abuse of these constitutional rights, we are well on our way to losing them. For these reasons, it is respectfully submitted that the trial court erred in denying appellants' motion to suppress all the evidence obtained as a result of the execution of the search warrants and the arrest warrants in this case. Accordingly, appellants' convictions should be reversed and the indictments should be dismissed.

CONCLUSION

The judgment of conviction should be reversed and the indictments dismissed, or in the alternative, a new trial should be granted.

Respectfully submitted,

IRVING ANOLIK
HERALD PRICE FAHRINGER
Attorneys for Appellants



UNITED STATES COURT OF APPEALS: SECOND CIRCUIT

Index No.

U.S.A.

Appellee,

against

POLITI,

Appellants.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 16th day of September 1974 at Foley Square, New York
deponent served the annexed Appendix, Appellant's Brief upon

Paul J. Curran, U.S. Attny.-Southern Dist.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 16th
day of September 19 74

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975